Supreme Court, U.S.
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No. 95-1084

In The

Supreme Court of the United States

October Term, 1995

STATE OF ALASKA,

Petitioner,

v.

BRUCE BABBITT, SECRETARY
OF THE INTERIOR, et al.,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

STATE OF ALASKA'S REPLY BRIEF

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April 22, 1996

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The State petitioned for certiorari because the conflicting decisions of the Alaska Supreme Court in *Totemoff v. State*, 905 P.2d 954 (Alaska 1995) and the Ninth Circuit will cause serious jurisdictional problems, and because the Ninth Circuit's interpretation of "public lands" usurps the State's right to manage fisheries in Alaska without clear indication that Congress intended this result. The respondents insist that no conflict exists. The United States maintains also that nothing has been finally decided by the courts below. In so arguing, the respondents have mischaracterized both the *Totemoff* case and the Ninth Circuit decision.

I. *TOTEMOFF* DIRECTLY CONFLICTS WITH THE NINTH CIRCUIT DECISION, AND THE ALASKA COURT OF APPEALS HAS ALREADY FOLLOWED THE ALASKA SUPREME COURT'S CONTRARY INTERPRETATION IN AFFIRMING THE CRIMINAL CONVICTION OF A RURAL RESIDENT.

The private respondents argue that fish and wildlife management will be harmonious in Alaska because *Totemoff* does not direct the State to do anything, and therefore the State is not bound to follow it. Private Opp. 24. That *Totemoff* itself does not direct the State to do anything is irrelevant; it constitutes law that Alaska State Courts must follow, holding that ANILCA's title VIII priority does not apply to navigable waters. The Alaska Court of Appeals, which hears state criminal appeals, already has issued a decision refusing to consider a rural Alaskan's argument that federal law applies to the stream where he was fishing when cited for state law violations. *Miyasato v. State of Alaska*, No. A-5486 (March 13, 1996).

The court declined to consider whether the stream might be "public lands," citing *Totemoff* and noting that the Alaska Supreme Court rejected the ruling of *State v. Babbitt*, 72 F.3d 698 (9th Cir. 1995). App. 3-4, 4 n.3. After the subsistence regulations become final, the *Totemoff* precedent presumably will compel state courts to conclude that the federal regulations are unauthorized and therefore invalid to the extent they purport to apply to waters subject to a federal reserved water right.

All respondents maintain that *Totemoff* did not present the issue of whether navigable waters constitute "public lands." To the contrary, the issue was squarely before the court. Mr. Totemoff raised his right to a subsistence priority under ANILCA as a defense to the State's prosecution for spotlighting deer from navigable waters. ANILCA's subsistence priority applies only to "public lands," 16 U.S.C. § 3114, so the court properly considered the issue of whether the navigable waters from which he shot the deer constitute "public lands."

This is not dictum because it is an alternative ground for the court's decision. The court determined both that ANILCA's subsistence priority does not include the right to spotlight deer and, alternatively, that even if it did, state law applies because the navigable waters of Prince William Sound do not constitute "public lands." 905 P.2d at 964. Where a decision rests on two or more grounds, none can be relegated to the category of "obiter dictum." *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949); *Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 340 (1928); *United States v. Title Insurance & Trust Co.*, 265 U.S. 472, 486 (1924); *see also MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 346 n.4 (1986) (Where lower

court rested its holding on alternative bases of decision, one base was not dictum). The Alaska Supreme Court could just as well have decided only the issue of whether the navigable waters constitute "public lands" and not reached the issue of whether ANILCA's subsistence priority protected the defendant's spotlighting activity on public lands.

The private respondents argue that if the State's predictions of jurisdictional problems had merit, enforcement of hunting and fishing laws would already be chaotic, because the State and the federal government have shared management on fast lands since 1990. Private Opp. 25-27. Their reassurances are misplaced. The State is not concerned here with jurisdictional problems related to federal management on federal lands and state management on state and private lands. The jurisdictional division between the Federal Subsistence Board and the State heretofore has been defined by distinct geographic boundaries that prevent the conflicts the State describes in its petition. With the ruling below, however, jurisdictional problems will arise because the Alaska Supreme Court and the Ninth Circuit have issued irreconcilable decisions as to which government has exclusive authority to regulate subsistence fishing on many navigable waters in Alaska. The federal regulations may purport to apply to waters with reserved in-stream flows, but the state courts will follow *Totemoff's* holding that these waters are not subject to the Federal Subsistence Board's authority.

II. THE NINTH CIRCUIT HAS ESTABLISHED AS CONTROLLING LAW THAT THE FEDERAL SUBSISTENCE BOARD MUST REGULATE FISHING IN ALL NAVIGABLE WATERS IN ALASKA SUBJECT TO A FEDERAL RESERVED WATER RIGHT, AND NO FURTHER COURT OR REGULATORY PROCEEDINGS WILL CHANGE THIS.

The United States argues that the Ninth Circuit decision "does not finally resolve the geographic scope of ANILCA's provisions" and "has not definitively resolved any legal rights." U.S. Opp. 13-15. These arguments might have some impact if the federal respondents' formulation of the "Question Presented" accurately described the ruling below. If the Ninth Circuit had merely ruled that the ANILCA subsistence priority "[applies] to fishing on some, but not all, navigable waters in Alaska," then the decision would have left the magnitude of the preemption quite uncertain. The court below went well beyond the United States' characterization, however. The Ninth Circuit held that federal agencies must identify the navigable waters of Alaska "in which the United States has an interest by virtue of the reserved water rights doctrine" and must assume fisheries management on these waters. 72 F.3d at 703-704.

This decision has far-reaching implications regardless of the outcome of further proceedings in this case. The Departments of Interior and Agriculture are not waiting for a final decision in this case to direct the Federal Subsistence Board to assume management of fishing for subsistence purposes in waters on about half of Alaska. While the regulations are not final, the United States has published its intent to take over management of fishing

within the boundaries of all National Parks, all National Preserves, all National Wildlife Refuges, all Wild and Scenic River Systems, the National Petroleum Reserve, Conservation and Recreation Areas, and the Chugach and Tongass National Forests. 61 Fed. Reg. 15,014 (April 4, 1996). This constitutes between 170-180 million acres of land, about half the size of Alaska (an area roughly equivalent to the states of Arizona and California combined). *See* Map of proposed areas of federal fisheries regulation, App. 6. Further, the regulations as proposed will grant the Federal Subsistence Board authority to restrict or eliminate fishing in waters beyond these areas, including commercial fishing in the territorial sea. 61 Fed. Reg. at 15,018.

From Alaska's perspective, much will be lost by the delay the United States advocates. The State will lose its traditional authority to manage its fisheries, one of the primary reasons Alaskans sought statehood, including some of its authority to regulate its second largest industry. Pet. 13-15. Alaskans will be subject to the confusion of separate sets of regulations and conflicting judicial interpretations of their applicability. From the United States' perspective, on the other hand, all that will be gained is delay. The United States has identified no unresolved claims or defenses in this case that could affect the Ninth Circuit's holding that "public lands" in ANILCA include all navigable waters in Alaska subject to reserved water rights, and none exist.

For this reason, the United States' second reason for opposing review, that rulemaking is underway in which the State may participate, is misleading. While the State may participate in the rulemaking designed to carry out

the Ninth Circuit's directive to identify navigable waters in which the United States has reserved water rights, 72 F.3d at 704, the Ninth Circuit already has decided the legal question that controls the rulemaking, and State participation cannot change this.[1]

III. THE CONTROLLING LAW ESTABLISHED BY THE NINTH CIRCUIT IS MANIFESTLY CONTRIVED, AND IT IS INCONCEIVABLE THAT CONGRESS INTENDED TO EMPLOY THE RESERVED WATERS DOCTRINE TO DELINEATE PUBLIC LAND BOUNDARIES IN ANILCA.

The private respondents maintain that the State is incorrect in arguing that federal reserved water rights do not identify a definite geographic area and that the rights must be quantified. Private Opp. 18-19. They assert that the mere existence of any federal interest in the waters will qualify them as "public lands." *Id.* This is not what 16 U.S.C. § 3102 says, however, and the difference between the clear meaning of this section and the Ninth

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[1] Eleven amici states disagree that the decision has no significance outside Alaska. U.S. Opp. 14-15. Despite the Ninth Circuit's assurance that its precedent does not authorize federal "usurpation" in other states, the amici point out that the court interpreted boilerplate language that appears throughout title 16 of the United States Code. Further, the amici take issue with the court's explanation that its interpretation of "public lands" is necessary to give meaning to ANILCA's purpose, pointing out that ANILCA is not the sole federal statute with a broad purpose.

Circuit's effective revision of it demonstrates the contrived nature of the decision below. Rather than examining the definition of "public lands" to determine whether Congress clearly intended to include waters subject to a federal reserved water right, the Ninth Circuit decided that ANILCA's purposes would be served by including some navigable waters, then effectively rewrote 16 U.S.C. § 3102 to accommodate this position. The court redrafted Congress' definition of "public lands" from "lands, waters, and interests therein, title to which is in the United States," to "lands and waters in which the United States has any interest." Under the definition as Congress wrote it, only the federal interest in lands and waters is "public lands," *e.g.*, only the reserved water right itself; the existence of a federal interest cannot be interpreted to convert tracts of land or entire waterways to "public lands." Congress did not draft 16 U.S.C. § 3102 to apply title VIII everywhere the slightest federal interest can be found, but the Ninth Circuit interpretation will include many non-federal lands in Alaska, as well as every waterway with federal access rights or nonreserved water rights. The manufactured nature of this interpretation defies any possibility that Congress intended its definition of "public lands" to be so construed, and thus defies the clear statement requirement.[2]

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[2] The private respondents maintain also that this Court already has decided the issue in this case in *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531 (1987). Private Opp. 17. The State has responded to this claim in its Opposition to the Cross-Petition of the Alaska Federation of Natives, at 11-13.

Clearly the Ninth Circuit wrongly decided this case. This Court should review the decision below because of its direct conflict with *Totemoff;* because public lands never have been defined by reserved water rights, and ANILCA and its legislative history give no indication that Congress meant the boilerplate language invoked by the court of appeals to have this effect; and because federal preemption of management of the valuable fishery resources of Alaska, announced by the Ninth Circuit with no acknowledgment of the clear statement rule, is an issue of grave public importance to Alaska.

CONCLUSION

For the reasons stated above and in the petition, this Court should grant the State of Alaska's petition.

Respectfully submitted,

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THE COURT OF APPEALS OF THE STATE OF ALASKA

CHESTER J. MIYASATO, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-5486 Trial Court No. 1SI-S93-237CR MEMORANDUM OPINION AND JUDGMENT* [No. 3359 – March 13, 1996]

Appeal from the District Court, First Judicial District, Sitka, Larry C. Zervos, Judge.

Appearances: Galen S. Paine, Assistant Public Defender, Sitka, and John B. Salemi, Public Defender, Anchorage, for Appellant. Joanne M. Grace, Assistant Attorney General, Anchorage, and Bruce M. Botelho, Attorney General, Juneau, for Appellee.

Before: Bryner, Chief Judge, and Coats and Mannheimer, Judges.

COATS, Judge.

The district court, sitting without a jury, convicted Chester J. Miyasato of fishing in waters closed under former 5 Alaska Administrative Code (AAC) 46.050(b) and (c)(5)(B). Specifically, Miyasato was charged and convicted of catching salmon over 16 inches in length in an area closed to fishing for salmon over 16 inches in

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* Entered pursuant to Appellate Rule 214 and Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3).

length.[1] Miyasato appeals, contending the state had no jurisdiction to prosecute him. Miyasato also argues that the state should have seized and preserved the salmon he caught. We affirm.

On August 25, 1993, State Fish and Wildlife Protection Officer Gary Hunt saw Miyasato, who was accompanied by two small children, fishing with a rod and reel in Starrigavan Creek; Hunt watched Miyasato catch a couple of fish and put them in his car. Hunt then stopped Miyasato in his car as Miyasato was leaving the creek area, and Miyasato admitted that he had caught three salmon. Hunt could see three cleaned fish, which Hunt recognized as salmon, in a basket in the back of Miyasato's car; Hunt estimated that the fish were between 18 and 21 inches long, well above the 16-inch limit. Hunt testified that the fish were longer than the basket they were in and the box holding the basket, which appeared to be a standard-type beverage case; Hunt later measured

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[1] Former 5 AAC 46.050(c)(5)(B) provided: "In fresh water . . . Starrigavan Creek is closed to salmon fishing." However, former 5 AAC 46.050(b) provided: "Fresh waters closed to salmon fishing but open to trout, grayling, char or kokanee fishing are also open to the taking of salmon less than 16 inches in length." Former 5 AAC 46.020(a) provided general bag limits for various kinds of fish, including kokanee, trout, and grayling. Former 5 AAC 46.020(b)(15) set out, as an exception to the bag limits in subsection (a), that "near Sitka, in . . . Starrigavin [sic] Creek, . . . rainbow trout and steelhead trout may not be possessed or retained from April 1 through June 30." Therefore, on August 25, 1993, in Starrigavan Creek, the date and location of the offense in this case, fishing for salmon less than 16 inches long was legal although the creek was otherwise closed to salmon fishing. (Chapter 46 of 5 AAC was repealed on April 15, 1994.)

a similar box and found it to be about 16.25 inches long by 10.5 inches wide. Hunt did not take possession of the fish, but let Miyasato keep them for food. Miyasato also admitted on that day that he did not have a personal use fishing permit. At trial, Miyasato testified that he had been subsistence fishing for salmon and had caught five humpy salmon; Miyasato testified that he did not know the length of the fish but added that "I would say that the officer gave a pretty good estimate of the length of the fish" and that the fish could have been over 16 inches long. After hearing the evidence, Acting District Court Judge Larry C. Zervos found that Miyasato had caught salmon over 16 inches long from Starrigavan Creek and had therefore violated the state regulations.

Miyasato first contends that the district court should have granted his motion to dismiss for lack of state jurisdiction over his offense. Specifically, Miyasato contends that the state did not have jurisdiction over fishing in Starrigavan Creek because the creek, or at least the tidal area of the creek, is "public land" subject to control by the federal government under the Alaska National Interest Lands Conservation Act (ANILCA).[2] Miyasato argues that the offense occurred on navigable waters and that ANILCA extends its grant of federal control of hunting and fishing to navigable waters. However, the Alaska Supreme Court has specifically held that navigable waters are generally not "public land" under ANILCA

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[2] 16 U.S.C. §§ 3101-3233.

and that the federal government does not have jurisdiction over them. *Totemoff v. State*, 905 P.2d 954, 962-68 (Alaska 1995).[3]

Miyasato also contends that Judge Zervos should have suppressed the evidence of the salmon or dismissed the case because the state did not seize and preserve the salmon. Before trial, Miyasato moved to compel discovery of the salmon from the state or, in the alternative, to suppress the evidence of the salmon. Judge Zervos denied the motion, noting that Miyasato had had possession and control of the fish and had been the one to destroy them.

The state's duty to preserve evidence extends only to evidence that the state has actually collected and taken into its possession. *Snyder v. State*, 879 P.2d 1025, 1028 (Alaska App. 1994); *March v. State*, 859 P.2d 714, 716 (Alaska App. 1993). Hunt never gathered or possessed the salmon that he saw in the back of Miyasato's car. Instead he cited Miyasato for the offense and let Miyasato keep the fish. Miyasato's retention of the fish allowed him a reasonable opportunity to preserve or measure the fish if he disputed Hunt's observations. Moreover, as

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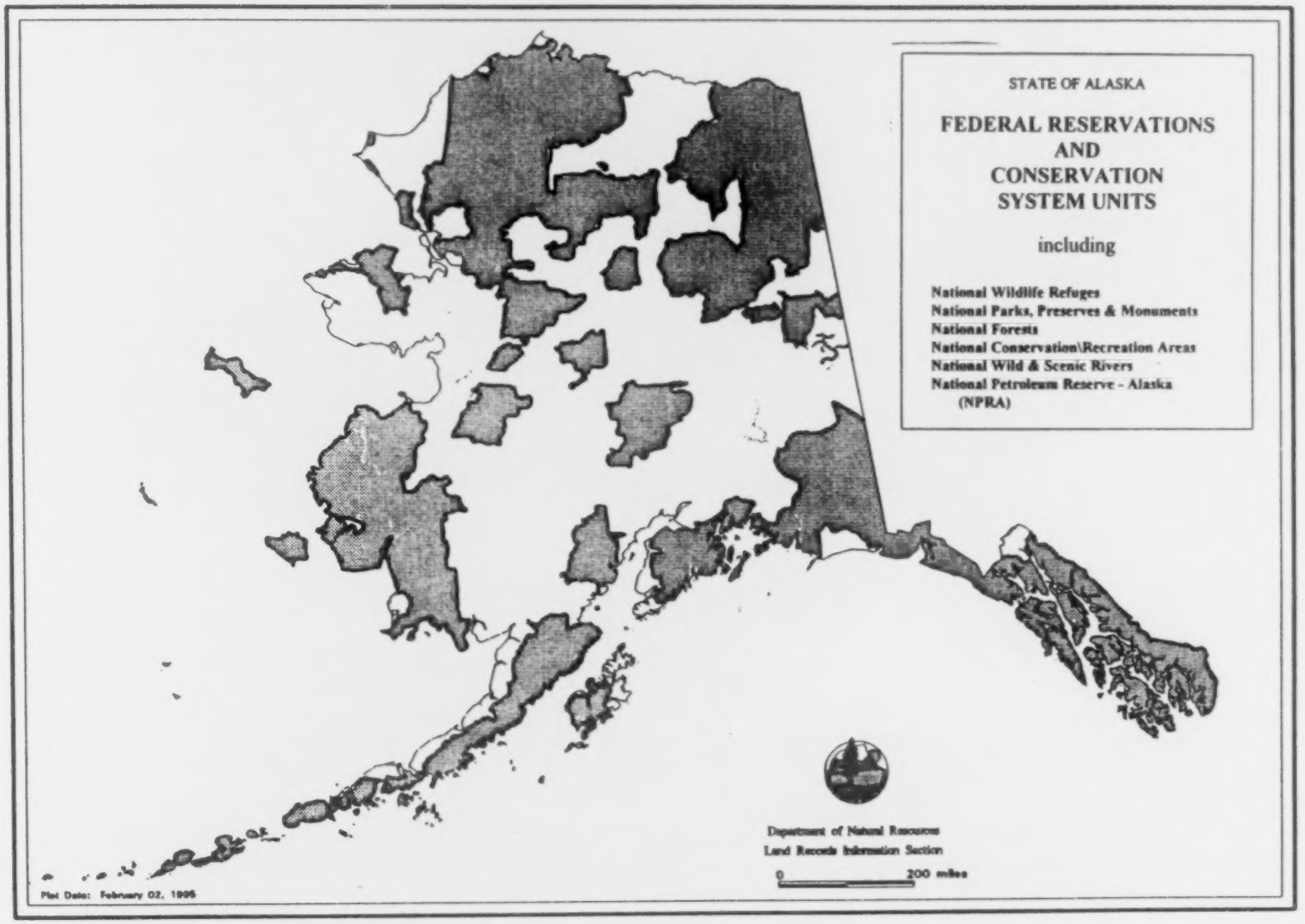
[3] Miyasato argues that we should follow the contrary decision of the Ninth Circuit in the *"Katie John"* case, *Alaska v. Babbitt*, 54 F.3d 549 (9th Cir. 1995), withdrawn and superseded by *Alaska v. Babbitt*, 72 F.3d 698 (9th Cir. 1995). However, the Alaska Supreme Court specifically rejected the ruling of *Katie John* on this point, noting that it was not bound by rulings of federal courts, other than the United States Supreme Court, on questions of federal law. 905 P.2d at 963. This court, in turn, is bound by the ruling of the Alaska Supreme Court on this issue. *Harrison v. State*, 791 P.2d 359, 363 (Alaska App. 1990).

Judge Zervos noted, the state's failure to seize and measure the fish deprived it of the potentially most conclusive incriminating evidence against Miyasato. At trial, the state presented only Hunt's testimony regarding his observations, rather than any measurements or test results. Miyasato took full advantage of the opportunity to challenge the credibility and accuracy of Hunt's observation through cross-examination and through his own testimony. To the extent that the fish themselves would have aided Miyasato's effort, Miyasato bears the responsibility for the absence of evidence. *Cf. Prenesti v. State*, 594 P.2d 63, 65 (Alaska 1979). Miyasato himself testified that Hunt had given "a pretty good estimate of the length of the fish." We find no error.

We AFFIRM the conviction.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